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IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF INTERNATIONAL COURT OF JUSTICE EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are either United States citizens who have benefited from consular assistance abroad or suffered in its absence; attorneys or diplomats familiar with the importance of consular assistance; or organizations dedicated to the interests of U.S. citizens abroad.

Ambassador L. Bruce Laingen served in the United States Foreign Service from 1949 to 1987. His tours of service included assignments in Germany, Iran, Pakistan, and Afghanistan. He served as U.S. Ambassador to Malta from 1977-1979. In mid-1979, he returned to Iran for a second term as Chargé d'Affaires of the American Embassy before being held hostage in the Iran Hostage Crisis from November 4, 1979 to January 20, 1981. During the Hostage Crisis, the United States sought and secured a judgment against Iran from the International Court of Justice based on Iran's violation of the Vienna Convention on Consular Relations. Ambassador Laingen holds the Award for Valor from the Department of State, as well as the Distinguished Public Service Medal from the Department of Defense.

Billy Hayes is a filmmaker, producer and writer based in Los Angeles, California. Mr. Hayes spent five years in a Turkish prison during the 1970s, an ordeal described in his book, *Midnight Express*, which was made into a feature motion picture by the same name. Prompt notification of the U.S. Consulate ensured that Mr. Hayes was able to retain a lawyer, while regular consular visits

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[1] Counsel for all parties have consented in writing to the filing of this brief, and those consents have been filed with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

throughout his incarceration provided an essential and reliable link to the outside world.

Richard Atkins practices law in Philadelphia, Pennsylvania, and has specialized for the past twenty-seven years in assisting American citizens who run afoul of the law in foreign countries. He served as Chairman of the Criminal Law Committee of the International Bar Association and has been a member for twenty-five years of the International Relations Committee of the American Correctional Association. He has testified before the Senate Foreign Relations Committee on international prisoner transfer agreements and wrote a guide to prisoner transfer treaties for the United Nations. Approximately a thousand incarcerated Americans abroad have been freed or returned with his assistance.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs from 1974-1976, and Under Secretary of State for Economic Affairs from 1976-1977. During his lengthy career as a diplomat, he played a key role in Secretary of State Kissinger's negotiations to end white rule in Rhodesia (now Zimbabwe), participated in the final Panama Canal Treaty negotiations, was special emissary for President Carter to El Salvador in 1980, co-chaired the Bilateral Commission on the Future of U.S.-Mexican Relations, and was Senior Counsel to the National Bipartisan Commission on Central America. He has also served as President of the Center for Inter-American Relations in New York, and as President of the American Society of International Law.

Founded in Geneva in 1978, **American Citizens Abroad** (ACA) is a non-profit, non-partisan organization dedicated to serving and defending the interests of U.S. citizens living outside the United States. ACA works closely to assist the U.S. Government in developing cohesive

national policies dealing with Americans overseas. The organization has members in over 90 countries worldwide, including Mexico.

Established in 1973, the **Association of Americans Resident Overseas** (AARO) is a volunteer, non-partisan service organization representing the interests of the millions of Americans living and working abroad. Its mission is to ensure that Americans resident overseas are guaranteed the same rights and privileges as their U.S. counterparts. AARO has worked to change U.S. laws and policies so that Americans abroad receive the same benefits and protection as citizens in the United States.

Founded in 1931, the **Federation of American Women's Clubs Overseas** (FAWCO) is a non-partisan network of 78 independent organizations in 38 countries around the world, with over 15,000 members. FAWCO is a non-profit U.S. corporation and a recognized NGO with special consultative status to the UN Economic and Social Council. Among its stated purposes is to defend the rights of all Americans overseas.

Amici stress that they take no position in this brief on the moral or legal propriety of capital punishment in the abstract, or whether a sentence of death is an appropriate sanction for Mr. Medellín. Some *amici* oppose the death penalty; some do not. All agree, however, that a failure by the domestic courts to give full effect to the rights and protections of the Vienna Convention on Consular Relations — as determined by the international court to which the United States, by treaty, committed their adjudication — would weaken the international framework of reciprocal rights and obligations essential to consular assistance to U.S. citizens, endangering the welfare of Americans abroad.

SUMMARY OF ARGUMENT

The petition before the Court arises from the adjudication by the International Court of Justice (ICJ) of a set of concrete cases involving both individual and national rights under Article 36 of the Vienna Convention on Consular Relations (Convention), and from the refusal of a state court to give effect to the ICJ's Judgment in the case of petitioner.

The United States, as a matter of its national self-interest, attaches great importance to the rights that Article 36 establishes and the corresponding obligations that it imposes — as do *amici*. Every year, a significant number of U.S. citizens traveling or living overseas find themselves ensnared in the criminal justice system of a foreign government. The prompt notification of rights and other requirements under Article 36 enable the effective provision of assistance by U.S. consular officers. That assistance affords a vital service to these Americans, maintaining a desperately needed link to the outside world, and helping them navigate and understand an unfamiliar, and perhaps hostile, legal system.

The United States played a leading role in drafting Article 36 of the Convention; the Statute that constituted the ICJ; and the United Nations Charter, the treaty that, among other things, established the ICJ as the supreme judicial organ of the U.N. The United States has also, throughout its history, resorted to interstate arbitration as a pacific means of resolving its disputes with other nations. This and other U.S. courts have traditionally enforced the decisions of these tribunals.

Amici respectfully urge that the Court do likewise here. In *Avena and Other Mexican Nationals*, the ICJ acted pursuant to jurisdiction to which both the U.S. and

petitioner's home country, the United Mexican States, assented by treaty.[2] The Court should accord binding effect to the resulting Judgment — as it has to the decisions of other tribunals established by international agreement — as a matter of U.S. obligation and interest. As the United States has informed the Court, "[c]onsular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected."[3]

Indeed, in the view of *amici*, if the United States does not give full effect to the *Avena* Judgment, U.S. citizens will almost surely suffer as a consequence. There seems little that would do more to undermine the rights on which U.S. consular assistance abroad depends than the failure by this country to enforce America's duly adjudicated Article 36 obligations at home.

ARGUMENT

I.

The Reciprocal Rights and Protections of Article 36 Reflect a Foundational Principle of United States Law and Foreign Policy

The framers of this nation's Constitution were acutely aware of the importance that civilized countries

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[2] *See* Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes art.1, Apr. 24, 1963, 596 U.N.T.S. 487.

[3] Brief for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928).

attach to protecting the rights of their citizens abroad when they established the federal judicial power to review all such cases:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.[4]

Indeed, "since the beginning of the country, since the time we first had diplomatic missions overseas, the fundamental purpose of embassies is to serve American citizens when they're in trouble as well as relating to foreign governments. That's a service and a responsibility that the State Department takes very, very seriously."[5]

As early as 1818, the United States exerted diplomatic efforts at the highest levels to secure the release

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[4] THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (J. Cooke ed. 1961). *See also Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) (Federal courts were given Article III jurisdiction over treaty claims so that "all persons who have real claims under a treaty should have their causes decided by the national tribunals"); *cf. Maldonado v. State*, 998 S.W.2d 239, 247 (Tex. Crim. App. 1999) ("Under the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law").

[5] R. Nicholas Burns, Spokesperson, U.S. Department of State, Daily Press Briefing (Sept. 29, 1995), *available at* http://web.archive.org/web/20041227074219re_/www.hri.org/docs/statedep/1995/95-09-29.std.html.

of American citizens unjustly imprisoned overseas. In a notorious incident, Richard Meade, a U.S. citizen, was imprisoned in Spain. He was "finally released only by reason of the active interposition of the government of the United States in his behalf."[6]

Shortly after the United States successfully protected its citizen in Spain, this Court recognized the reciprocal right of the Spanish consul to safeguard the interests of his fellow-citizens in this country:

> To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in Courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the Courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it.[7]

Fulfillment of this central principle of American law and values has not been confined to the Executive and Judicial Branches. Responding to the arbitrary imprisonment of Mr. Meade in Spain, the U.S. House of Representatives endorsed a resolution in 1818 that "it is the right and duty of the government of the United States to afford to Mr. Meade its aid and protection; and that this

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[6] *Meade v. United States*, 76 U.S. 691, 693 (1869).

[7] *The Bello Corrunes*, 19 U.S. 152, 168 (1821).

House will support and maintain such measures as the President may hereafter adopt, to obtain [his] release . . . ."[8] Following a series of incidents in which U.S. citizens abroad were deprived of their liberty without due process, Congress enacted a statute in 1868 that remains in effect. It authorizes the President to use "such means . . . as he may think necessary and proper to obtain or effectuate the release" of those citizens.[9]

In 1934, when Mexico complained that California officials had not afforded consular access to a detained Mexican citizen, the Department of State stressed the importance of local compliance with the standards upheld by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.[10]

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[8] 32 ANNALS OF CONG. 1699-1700 (1818) *See also* 31 ANNALS OF CONG. (1817) at 832-833 for Secretary of State Adams' correspondence with the Spanish Government concerning the Meade Affair, in response to an earlier House resolution requesting information on the case, *available via* http://memory.loc.gov/ammem/amlaw/lwac.html.

[9] *See* 22 U.S.C. § 1732 (Protection of citizens abroad) (derived from act of July 27, 1868, ch. 249, Sec. 3, 15 Stat. 224).

[10] Secretary Hull to Governor Rolph, telegram of April 10, 1934, Dept. of State file 311.1221 Aragon, Jose/3, reprinted in 4 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 836-37 (1942).

Acting on this core principle, the United States played a central role in the development of the Vienna Convention on Consular Relations. While most Convention provisions codify customary international law, Article 36(1)(b) broke new ground by requiring that foreign detainees be informed without delay of their individual right to consular notification and access.[11]

Significantly, the United States recognized even before ratification that vigorous enforcement of Article 36 would provide important reciprocal benefits to U.S. citizens overseas. The Report of the U.S. Delegation to the United Nations Conference on Consular Relations (Report) notes that Article 36(1)(b) establishes a "requirement which is not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad."[12] Indeed, the U.S. government has emphasized in pleadings to the ICJ that the right of consular communication and access secured by Article 36 of the VCCR is "so essential to the exercise of consular functions that its

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[11] For a discussion of the United States' role in drafting the final text of Article 36 and its reasons for doing so, see Brief of Amici Curiae Ambassador L. Bruce Laingen and Capt. John J. Swift, et al., at 6-16, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928).

[12] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 60. Elsewhere, the Report notes that "[t]he standard of treatment required by the present Convention conforms in all essential respects to the views of the United States as to what is or should be required by international law and practice." *Id.* at 74.

preclusion would render meaningless the entire establishment of consular relations."[13]

II.

The United States Relies on and Enforces the Decisions of International Tribunals as a Means of Resolving Disputes Concerning Rights Such as Those Provided for in Article 36

The United States has often resorted to ICJ adjudication and to the settlement of international disputes through arbitral tribunals. The United States has also sought and provided fully effective local implementation of the resulting decisions.

In 1979, the United States submitted an application instituting proceedings against the Islamic Republic of Iran "concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals."[14] The United States requested that the ICJ "adjudge and declare" that Iran was under a "particular obligation immediately to *secure the release* of all United States nationals currently being detained."[15] Thus, the United States sought more than a declaration that Iran had violated U.S. rights under the Convention. It sought a judgment that Iran was obligated to provide an effective remedy for the violation, fully implemented in fact.

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[13] Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), I.C.J. Pleadings (1980), p. 174.

[14] *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

[15] *Id.* at 6 (emphasis added).

The ICJ entered such a judgment, deciding that:

> [T]he Islamic Republic of Iran must immediately take all steps to redress the situation resulting from [the hostage-taking and following events], and to that end ... must immediately terminate the unlawful detention of the United States Chargé d'Affaires [(*amicus* here)] and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one ....[16]

Thereafter, the United States insisted that Iran must comply with the ICJ's judgment.[17]

Moreover, the Executive Branch has consistently acted to secure prompt domestic compliance with judgments in other cases which the United States recognized as falling within the compulsory jurisdiction of the ICJ. Following an ICJ judgment, the United States dismissed all cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ.[18] Extraterritorial treaty rights of the United States in Morocco were later relinquished by a memorandum of President Eisenhower,

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[16] *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24), *dispositif*, ¶ 3(a).

[17] *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, pg. 9: "The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions."

[18] *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176 (Aug. 27).

dated September 15, 1956, and all cases pending before the consular courts were disposed of by 1960.[19]

In 1979, the United States and Canada agreed to submit a longstanding maritime boundary dispute to the ICJ for adjudication.[20] Although the ICJ's determination of the international boundary in the disputed fishing area "gave to Canadian fishermen waters that New Englanders had fished for more than 200 years,"[21] the Executive Branch nonetheless acted promptly to ensure full domestic compliance with the Judgment.[22]

U.S. courts have long applied the same principles to the resolution of claims arising under treaties. Where a treaty invests an international body with the authority to adjudicate claims arising under its terms, this Court has declared that the decision of that body is "conclusive and final. . . . The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction."[23]

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[19] 22 U.S.C. § 141 note (Ancillary Laws and Directives).

[20] Special Agreement between the Government of Canada and the Government of the United States of America to Submit to a Chamber of the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine Area, U.S.-Can., art. 2(4), Mar. 29, 1979, 33 UST 2797.

[21] *Around the Nation*: *New Fishing Boundaries Are Reported Observed*, N.Y. Times, Oct. 28, 1984.

[22] *Id.* (reporting that a U.S. Coast Guard vessel was on hand to patrol the area of the new boundary line, two weeks after the ICJ decision was announced).

[23] *Comegys v. Vasse*, 26 U.S. 193, 212 (1828); *see also Meade v. United States*, 76 U.S. 691, 725 (1869) (decision of treaty commissioners "dismissing the claim was final and conclusive, and bars a recovery upon the merits" in the domestic courts).

Notably, international arbitral awards resolving treaty-based disputes brought by the United States or Mexico on behalf of their respective citizens have been upheld on the same grounds of finality. The Court has termed such awards "final and conclusive,"[24] and noted that it "might well doubt the soundness of any conclusion that could be regarded as weakening or tending to weaken the force that should be attached to the finality of an award made by an international tribunal of arbitration."[25]

Thus, U.S. practice with respect to ICJ judgments has been consistent with its treatment of the decisions of international arbitral tribunals. This comes as no surprise, as the ICJ's "principal purpose is to arbitrate particular disputes between national governments" as "the principal judicial organ of the United Nations."[26] That practice is also consistent with the express treaty obligations of the United States. In cases that lie within the compulsory jurisdiction of the ICJ, the ICJ's judgment is "binding between the parties . . . with respect to that particular case;" it is "final and without appeal."[27]

There can be no dispute that Mexico's claims in *Avena* concerning its own rights and the rights of Mr. Medellín and other Mexican nationals under Article 36 of the Convention lay within the ICJ's compulsory jurisdiction. As

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[24] *Frelinghuysen v. United States ex rel. Key*, 110 U.S. 63, 67 (1884) (judgments of arbitral tribunals "are final and conclusive until set aside by agreement between the two governments.").

[25] *La Abra Silver. Min. Co. v. United States*, 175 U.S. 423, 463 (1899).

[26] *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2684 (2006).

[27] Statute of the International Court of Justice, Arts. 59, 60, 59 Stat. 1062, T.S. No. 993 (1945); *Sanchez-Llamas*, 126 S.Ct. at 2684 (citing ICJ Statute).

a matter of its own long-established practice and its binding treaty obligation, the United States should give the *Avena* Judgment full effect in domestic proceedings.

President Bush has determined that the United States will abide by its international obligations under the *Avena* Judgment "by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the fifty-one Mexican nationals addressed in that decision."[28]

As the United States explained in its brief filed with the Court, compliance "serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law."[29]

By contrast, a failure to give full effect in domestic law to the *Avena* Judgment would have profoundly negative consequences for international relations. The United States is a party to dozens of treaties recognizing the adjudicative authority of the ICJ. The reliability of the United States as a treaty partner, as well as its honor and integrity, is impugned if its commitment to abide by the outcome of the ICJ's adjudication of concrete cases is reduced to a nullity here. Indeed, the entire international framework on which consular assistance depends would be profoundly weakened if the

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[28] Brief for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 app. 2 (2005) (No. 04-5928) (appending President Bush's memorandum for the Attorney General concerning compliance with the decision of the International Court of Justice decision in *Avena*).

[29] Brief for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928) at 11-12.

United States, particularly given its prominence, can freely submit Article 36 disputes to binding ICJ adjudication under a multilateral treaty and then fail to meet its obligation to implement the resulting judgment fully.[30]

III.

Failure to Enforce the *Avena* Judgment Could Have Grave Consequences for U.S. Citizens Abroad

The importance to the United States of compliance with the reciprocal obligations that Article 36 imposes cannot be overstated. As U.S. jurist Stephen M. Schwebel, in his capacity as President of the ICJ, aptly observed, "the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States."[31] Over the last thirty years, the number of Americans living overseas has increased dramatically. The State Department now estimates that "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year."[32] More than 385,000 U.S. citizens reside in Mexico, the largest

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[30] *Cf. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international [arbitration] agreements.").

[31] *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 426 (Apr. 9).

[32] BUREAU OF RESOURCE MANAGEMENT, U.S. DEPARTMENT OF STATE, FY 2003 PERFORMANCE AND ACCOUNTABILITY REPORT 141 (2003), *available at* http://www.state.gov/m/rm/rls/perfrpt/2003/html/29037.htm.

expatriate American community in any country.[33] The State Department also reports that over 2500 Americans are arrested abroad annually.[34] This total does not include the number of citizens detained outside the formal criminal justice process; all told, roughly 6000 Americans are arrested or detained abroad every year.[35] The largest number in long-term detention — some 400 — are in Mexico.[36] These statistics show that, at one time or another, many U.S. citizens will find themselves overseas in need of legal help, and foreshadow the grave consequences that a failure to apply the *Avena* Judgment could have for American citizens abroad.

One of the "fundamental responsibilities" of U.S. consulates is "helping Americans who are incarcerated; advising them of their legal rights when they're incarcerated, when [they're] imprisoned in foreign countries; helping to

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[33] *See* Bureau of Consular Affairs, *Tips for Travelers to Mexico*, October 2006, *available at* http://travel.state.gov/travel/tips/regional/regional_1174.html.

[34] Office of Overseas Citizens Services, U.S. Department of State, Department of State Publication 10252, *Overseas Citizens Services*, (2002), *available at* http://travel.state.gov/law/info/info_615.html.

[35] Kevin Herbert, *The Terrorist Threat to the American Presence Abroad: A Report of a Consultation of The Critical Incident Analysis Group and The Institute for Global Policy Research, Part II. 2. Threat to Citizens Overseas*, University of Virginia, April 12-13, 1999, *available at* http://www.healthsystem.virginia.edu/internet/ciag/publications/report_terrorist_threat_abroad_c1999.pdf (report by the Office of Overseas Citizens Services, U.S. Department of State).

[36] Press Statement by James P. Rubin, Spokesperson, U.S. Department of State (Apr. 15, 1998), *available at* www.hri.org/news/usa/ std/1998/98-04-15.std.html.

get them legal assistance."[37] The State Department has repeatedly stressed to domestic officials the vital importance of reciprocal enforcement of Convention. As Governor of Texas, George W. Bush received a letter from Secretary of State Madeleine Albright that noted:

> Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.[38]

On another occasion, Secretary Albright cautioned that non-compliance with the orders of the International Court of Justice "could be seen as a denial by the United States of the significance of international law and the court's processes in its international relations and thereby limit our ability to insure that Americans are protected when living or traveling abroad."[39]

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[37] R. Nicholas Burns, Spokesperson, U.S. Department of State, Daily Press Briefing (Sept. 29, 1995), *available at* http://web.archive.org/web/20041227074219re_/www.hri.org/docs/statedep/1995/95-09-29.std.html.

[38] S. Babcock, The Role of International Law in United States Death Penalty Cases, 15 LJIL 367, 376 (2002) (quoting from Secretary Albright's letter to Governor Bush, dated November 27, 1998).

[39] Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. Times, April 14, 1998, page 14 (quoting from Secretary Albright's letter to Virginia Governor James Gilmore).

In a decision giving effect to the *Avena* Judgment in the Osbaldo Torres case, the Oklahoma Court of Criminal Appeals put the matter plainly:

> The essence of a Vienna Convention claim is that a foreign citizen, haled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government. Even if that assistance cannot, ultimately, affect the outcome of the proceedings, it is a right and privilege of national citizenship and international law. The issue is not whether a government can actually affect the outcome of a citizen's case, but whether under the Convention a citizen has the opportunity to seek and receive his government's help. This protection extends to every signatory of the Convention, including American citizens.[40]

Members of the Texas Court of Criminal Appeals have also recognized the importance of reciprocal compliance and enforcement. Several years ago, four of its members observed:

> If the United States does not provide a mechanism for enforcing the Vienna Convention, why should other signatories enforce the provisions of the treaty? The treaty is an important protection to Texans traveling in other nations. This State should extend the same protections to foreign nationals in Texas that we expect to be

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[40] *Torres v. State*, 120 P.3d 1184, 1187 (Okla.Crim.App. 2005).

> extended to our citizens when they are abroad.[41]

Indeed, much the same concern is evident in opinions filed in *Ex parte Medellín*. Four of the judges noted that they had "no doubt that the President and other executive branch officials play a vital role in protecting the interests of American citizens abroad when necessary."[42] Another judge wrote separately to emphasize full domestic compliance with Article 36 "as an obligation that must be fulfilled in the same manner we all hope is reciprocated by other nations whose detained nationals might be United States citizens."[43]

Two recent cases of U.S. citizens arrested abroad illustrate the vital necessity of maintaining universal compliance with consular notification and access obligations. Pulitzer Prize-winning reporter Paul Salopek was arrested in the Sudan when on assignment for *National Geographic* magazine to the Darfur region. Mr. Salopek was charged with spying, using official information, publishing false news and entering Sudan without a visa. He endured death threats, beatings and lengthy interrogations during his confinement. According to a State Department news article on the case,

> U.S. consular officials have met with Salopek in prison and are providing assistance. In addition, the U.S. Embassy in Khartoum has been in regular contact with Salopek's family

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[41] *Rocha v. State*, 16 S.W.3d 1, 26 (Tex. Crim. App. 2000) (Holland, J., concurring).

[42] *Ex parte Medellín*, ___ S.W.3d ___, 2006 WL 3302639 (Tex. Crim. App. 2006), slip opinions at 19.

[43] *Id.* at 28 (Price, J., concurring).

> and his editors. The State Department has emphasized to the government of Sudan that it expects Salopek to receive a fair and speedy trial.
>
> In general, when Americans are arrested overseas, U.S. consular officials work to protect U.S. citizens' legitimate interests and ensure they are not discriminated against. Embassy personnel provide a list of local attorneys, visit American prisoners, inform those prisoners about local laws and contact family and friends. Consular officers can transfer money, food and clothing to the prison authorities from family or friends, and can try to get relief if Americans are being held under inhumane or unhealthful conditions.
>
> State Department officials expressed concern that Sudanese authorities failed to notify the U.S. Embassy, as mandated by the Vienna Convention on Consular Relations, for nine days after Salopek was detained.[44]

The same article noted that "a Sudanese court convicted American college student Ethan Rafal of entering Sudan without a visa and ordered him deported" and that Mr. Rafal returned to the United States two days later "after close cooperation between U.S. Embassy and Sudanese officials." In Mr. Salopek's case, less than a month after U.S. consular

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[44] Michelle Austein, Press Freedom Group Calls Journalist's Jailing "Disgraceful," U.S. Department of State International Information Programs, Aug. 28, 2006, *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=006&m=August&x=20060828161927hmnietsua0.6934931.

officials intervened and following high-level diplomatic efforts, all charges against him were dropped and he was released from custody.[45]

Similarly, Gao Zhan, a sociologist and permanent resident based at American University, was traveling with her young son in China when she was arrested for espionage.[46] She and her son, an American citizen, were held *incommunicado* by China's state security ministry, without notice to the U.S. Embassy. When her husband came to China seeking information, he too was detained and threatened.[47] These arbitrary detentions of Americans abroad prompted the House of Representatives to pass a resolution unanimously condemning the acts of the foreign government and endorsing executive intervention, just as the House had done nearly two centuries before in the Meade case.[48]

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[45] *See Sudanese Government Drops Spy Charges, Releases American Journalist*, PBS Online Newshour, Oct. 9, 2006, *available at* http://www.pbs.org/newshour/bb/africa /july-dec06/salopek_10-09.html; *see also* Richard A. Lovett and Ted Chamberlain, *Freed by Sudan, "Geographic" Reporter Arrives Home in U.S.*, National Geographic News, Sept. 10, 2006, *available at* http://news.national geographic.com /news/2006/09 /060910-salopek.html.

[46] *See US Family Detained in China*, BBC News, Mar. 21, 2001, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/1233163.stm; Ann Scott Tyson, *Where's Gao? Disappeared in China: 100 days and counting*, Christian Science Monitor, June 5, 2001, *available at* http://www.csmonitorservices.com/csmonitor/archivesearch.jhtml.

[47] *See id.*

[48] *See* H.R. Res. 160, 107th Cong. (2001) (House "condemns and deplores the lack of due process afforded" to Chinese-American scholars detained in China and the President should make their immediate release "a top priority of U.S. foreign policy"); *cf.* 32 ANNALS OF CONG. 1699 (1818) (imprisonment of Meade "is an act of cruel and unjustified

As U.S. officials have repeatedly stressed, the authority of the United States, both moral and legal, to demand that other nations comply with their obligations in such cases depends on U.S. compliance with the same obligations at home. At no time could those obligations be clearer than they are now. The ICJ adjudicated a set of cases, including petitioner's. The resulting *Avena* Judgment found violations of Article 36 rights and held that the necessary remedy, in this and other cases that resulted in convictions and severe sentences, is a judicial process that will "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account."[49]

This adjudication, to which the United States bound itself by treaty, defines the United States' obligations as a matter of its own law and long-standing practice,[50] and as a

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oppression" and the House "will support and maintain such measures as the President may hereafter adopt" to obtain his release).

[49] *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶ 138.

[50] THE FEDERALIST NO. 64, at 392 (John Jay) (Clinton Rossiter ed., 2003):

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.

matter of its national interest. The many Americans who live, work, and invest abroad — and most of all those arrested in foreign jurisdictions — depend for their safety and security on the faithful observance of reciprocal obligations. *Amici* urge the Court to give the same full effect to the treaty commitments at issue now that it has long provided in the past[51] and that the United States has, during its entire history, justly insisted on for its own citizens abroad.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below.

Respectfully submitted,

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[51] *See, e.g., Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879) ("We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect.").